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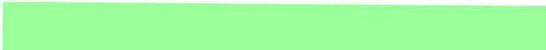
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



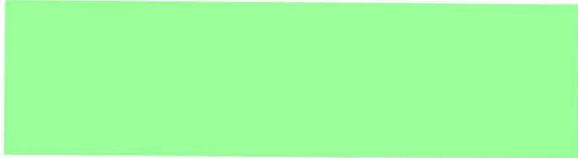
U.S. Citizenship  
and Immigration  
Services



DATE: **MAY 22 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

ON BEHALF OF PETITIONER:  


**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a lighting protection and grounding company. It seeks to employ the beneficiary permanently in the United States as a senior manager-export sales. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner marked box “e” at Part 2, indicating that it seeks to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).

As required by statute, the petition is accompanied by an ETA Form 9089 labor certification application (labor certification) approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is August 5, 2010.<sup>1</sup> See 8 C.F.R. § 204.5(d).

The director determined that the petitioner had not established that the petition requires a minimum of a baccalaureate degree, and therefore, that the beneficiary cannot be found qualified for classification as a professional. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director’s denial, the issue in this case is whether or not the petitioner has established that the petition requires a minimum of a bachelor’s degree such that the beneficiary may be found qualified for classification as a professional.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup> On appeal, counsel submits that the minimum requirements of the job proffered, as set forth on the labor certification, support a classification as a professional position.

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<sup>1</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>3</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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<sup>3</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) of the Act.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as a professional. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

For classification in the requested employment-based category, the regulations state that the minimum requirements of the offered position must meet the requirements of the requested classification. 8 C.F.R. § 204.5(l)(3)(ii).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

Section 101(a)(32) of the Act defines the term “profession” to include, but is not limited to, “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” If the offered position is not statutorily defined as a profession, “the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.” 8 C.F.R. § 204.5(l)(3)(ii)(C).

In addition, the job offer portion of the labor certification underlying a petition for a professional “must demonstrate that the job requires the minimum of a baccalaureate degree.” 8 C.F.R. § 204.5(l)(3)(i).

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor’s degree as a minimum for entry. Further, the job offer portion of the underlying labor certification must require a minimum of a bachelor’s degree or a foreign equivalent degree as a requirement of the proffered job position.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg’l Comm’r 1977). It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree: “[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have

experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' requirement of a single "degree" for members of the professions is deliberate.

The regulation also requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). However, for the professional category, it is clear that the degree must be from a college or university.

The proffered position's requirements are found on ETA Form 9089 Part H. Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Bachelors.

4-B. Major Field Study: Business Administration.

6. Is experience in the job offered required for the job?

Petitioner indicated "no" to this question.

7. Is there an alternate field of study that is acceptable?

The petitioner checked "yes" to this question.

7-A. If Yes, specify the major field of study:

Marketing or related field.

8. Is there an alternate combination of education and experience<sup>4</sup> that is acceptable?

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<sup>4</sup> Note that the DOL instructions for the ETA Form 9089 provides that question H.8 refers to an alternate combination of education and experience that the petitioner will accept *in lieu* of the minimum requirement identified in question H.4, which in this case was a bachelor's degree.

The petitioner checked "yes" to this question.

8-A. If yes, specify the alternate level of education required:

Other.

8-B. If Other indicated in question 8-A, indicate the alternate education required:

Post-secondary education and experience equating to bachelor's degree in Business.

8-C. If applicable, indicate the number of years experience acceptable in question 8 [relating to to acceptable alternate combination of education and experience]:

Petitioner indicated "0 [zero]" years.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

10. Is experience in an alternate occupation acceptable?

The petitioner checked "yes" to this question.

10-A. If Yes, number of months experience in alternate occupation required:

Petitioner indicated 24 months (2 years) in the related occupation was acceptable.

10-B. Identify the job title of the acceptable alternate occupation:

Head of Products Promotion.

11. Job duties:

Coordinate all international projects, products registration, offer submission and orders execution. Coordinate with international clients and distributors regarding distributor agreements, business relations, and business development. Generate new overseas markets and conduct introduction and promotion of the company's products and systems. Monitor distributors and assist them in specifying the products for upcoming international projects with major oil, gas, and telecommunications companies. Assign new distributors to enhance business within target clients.

14. Specific skills or other requirements:

The absolute minimum requirements include a Bachelor's degree in Business Administration, Marketing, or a related field (*or post-secondary education and experience equating to a Bachelor's degree in Business Administration, Marketing, or a related field*), plus two (2) years of experience working with overseas markets including preparing quotes for overseas projects and preparing prequalification packages to register a company as a vendor. The experience must also have included working with import matters including shipping documents, document legalization, working with incoterms, supervision of shipments and other related tasks; import management in the Asia, Middle East and Africa markets; and supervising international business including generating opportunities, submitting project proposals, finding distributors companies, and successful product delivery. *Any suitable combination of education, training, or experience is acceptable.* (emphasis added).

As set forth above, although the labor certification indicates that the minimum educational requirements of the proffered position is a bachelor's degree plus two years of experience in an alternate occupation,<sup>5</sup> it also specifies that the allowed alternate education is less than a bachelor's degree: post-secondary education and experience *equating to* a bachelor's degree in Business Administration, Marketing, or a related field is alternatively acceptable. Thus, the minimum requirements for the position can be satisfied by a combination of education and experience equating to a bachelor's degree, in lieu of a bachelor's degree itself. *See supra* Fn.3.

Counsel has attached on appeal copies of the advertisements used during the labor certification recruitment process in an attempt to show that the minimum requirements of the proffered job on the labor certification support a professional classification on the petition before United States Citizenship and Immigration Services (USCIS). However, those job postings reflect that post-secondary education and experience equivalent to a bachelor's degree would be acceptable to qualify for the position as an alternative to the bachelor's degree. Additionally, the certified terms of the labor certification clearly accept education that is less than a bachelor's degree in question H.8-B. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The regulations for a professional classification require that the proffered job on the labor certification must require the minimum of a baccalaureate degree. 8 C.F.R. § 204.5(1)(3)(i). As the requirements of the job offered here can be satisfied even without a bachelor's degree here, the position does not qualify for a professional classification.

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<sup>5</sup> As noted, the petitioner did not require experience in the job offered as a requirement in question H.6, yet indicated it would accept 24 months experience in an alternate occupation, Head of Products Promotion, under question H.10.

Accordingly, the evidence of record does not establish that the petition requires a minimum of a bachelor's degree for the job proffered, such that the beneficiary may be found qualified for classification as a professional.

In addition, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Thus, beyond the decision of the director, the AAO also notes that the petitioner has failed to demonstrate that the beneficiary satisfies the requirements of the proffered position as stated in the labor certification. The requirements for the proffered position on the labor certification are either a bachelor's degree in Business Administration or post-secondary education and experience equating to a bachelor's degree in Business Administration, Marketing, or a related field. The ETA Form 9089 more specifically requires a minimum of 24 months experience in the related occupation of Head of Products Promotion with the specific skills referenced in question H.14. The petitioner submitted an evaluation that equates the beneficiary's credentials to a bachelor's degree by relying on a combination of education and experience, but the petitioner must also demonstrate that the beneficiary has the additional two years of experience and special skills required by the terms of the labor certification. The labor certification indicates that the beneficiary gained the requisite experience with [REDACTED] in Amman, Jordan, as Head of Products Promotion in a full-time capacity from December 17, 2004 to December 31, 2006. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). However, the record does not contain a letter<sup>6</sup> from [REDACTED] setting forth the beneficiary's referenced experience, as required. Similarly, as previously shown, the labor certification requires that the beneficiary have special skills or other requirements, as itemized at question H.14. The record, however, does not address how or if the beneficiary satisfies these requirements. Consequently, the petitioner has failed to demonstrate that the beneficiary satisfies the requirements for the proffered position as set forth in the labor certification.

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<sup>6</sup> The record does contain a letter, dated July 20, 2002, from [REDACTED] which predates the beneficiary's claimed experience on the labor certification. The letter indicates that the beneficiary was employed with the company from August 15, 1990 up until the 2002 date of the letter in various capacities, commencing with the position of an Executive Secretary and progressing to being "given" the company's "Products Promotion" in 1995. This experience is not reflected in the approved labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board noted in dicta that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. Moreover, the AAO notes the letter does not set forth in any specificity a description of the training the beneficiary received or work experience, as required under 8 C.F.R. § 204.5(l)(3)(ii)(A).

Furthermore, beyond the decision of the director, the evidence of record fails to establish the petitioner's ability to pay the beneficiary the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, as previously noted, the ETA Form 9089 was accepted on August 5, 2010. The proffered wage as stated on the ETA Form 9089 is \$46,176 per year.

The evidence in the record of proceeding indicates that the petitioner is structured as a C corporation. The record contains what purports to be the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the years 2009 and 2010 and the 2010 IRS Form W-2 issued to the beneficiary by the petitioner. The AAO observes that the federal employer identification number (EIN) for the employer on the tax returns and on the beneficiary's IRS Form W-2 is XX-XXXX153. However, the EIN number listed for the petitioner on the underlying labor certification and Form I-140 petition in this case is XX-XXXX550, which indicates that the employer on the labor certification and petition is a different entity than the one on the tax return and Form W-2. The record does not address or provide an explanation for this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Nothing in the record establishes any successor<sup>7</sup> relationship

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<sup>7</sup> Based on the different EINs referenced, the incorporated entity on the IRS Form 1120 appears to be a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership

between the two entities. As the record does not demonstrate that the the 1120 Forms in the record relate to the petitioning business or its *bona fide* successor-in-interest, the petitioner has failed to satisfy the requirements of 8 C.F.R. § 204.5(g)(2), which require the petitioner to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date to establish its ability to pay the beneficiary the proffered wage. The failure to do so is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. 8 C.F.R. § 204.5(g)(2)

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. As noted, the evidence in the record does not address this issue at all. In any future filings, the petitioner must address all three conditions to establish successorship.